

Assembly Bill No. 361

Passed the Assembly August 29, 2011

Chief Clerk of the Assembly

Passed the Senate August 22, 2011

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2011, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to add Part 13 (commencing with Section 14600) to Division 3 of Title 1 of the Corporations Code, relating to benefit corporations.

LEGISLATIVE COUNSEL'S DIGEST

AB 361, Huffman. Benefit corporations.

Existing law, the General Corporation Law, authorizes and regulates the formation and governance of general corporations. The Nonprofit Corporation Law authorizes the formation and governance of nonprofit public benefit corporations, nonprofit mutual benefit corporations, and nonprofit religious corporations, and specifies the respective purposes for which those corporations may lawfully be formed. Existing law specifies the duties of corporate directors and the rights of shareholders. Existing law does not provide for the formation and governance of benefit corporations.

This bill would authorize and regulate the formation and governance of a new form of corporate entity known as a benefit corporation. The bill would also permit an existing corporation to become a benefit corporation by amendment to its articles of incorporation, as specified, adopted by at least a minimum status vote, as defined, and would permit a corporation to become a benefit corporation through a merger, reorganization, or conversion, or domestic other business entity, as specified.

This bill would define “benefit corporation” to mean a corporation that has been organized under the General Corporation Law and has elected to become subject to the provisions of the bill, as specified. The bill would provide that a benefit corporation may be formed for the purpose of creating general public benefit, defined as a material positive impact on society and the environment, taken as a whole, as assessed against a 3rd-party standard, as defined, that satisfies certain requirements. The bill would also provide that a benefit corporation may identify one or more specific public benefits, as defined, as an additional purpose of the corporation, including, without limitation, providing low-income or underserved individuals or communities with

beneficial products or services, promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business, preserving the environment, and improving human health.

This bill would require directors to consider the impacts of any action or proposed action upon specified considerations, including, among others, the shareholders and employees, and of customers who are beneficiaries of the general or specific public benefit purposes, and the environment, and would allow directors to consider the impacts of those actions on, among other things, the resources, intent, and conduct of any person seeking to acquire control of the benefit corporation.

This bill would require the board of directors to prepare a specified statement relating to the public benefit purposes of the corporation. The bill would require the benefit corporation to prepare an annual benefit report to include, among other things, a statement indicating whether, in the board's opinion, the benefit corporation failed to pursue its general public benefit and any specific public benefit, a description of the ways in which the benefit corporation pursued those benefits, the extent to which those benefits were created, and the process and rationale for selecting the 3rd-party standard used to prepare the benefit reports, and would require the benefit corporation to file with the Secretary of State a copy of the benefit report together with a filing fee in a specified amount to cover the reasonable regulatory costs associated with maintaining those filings.

This bill would include provisions governing the fiduciary duty and liability of an officer or director of a benefit corporation. The bill would provide that the duties of a director or officer, and the general, and any specific, public benefit purpose of a benefit corporation, may be enforced only in a benefit enforcement proceeding, as defined, that would be permitted to be commenced or maintained only as specified.

The people of the State of California do enact as follows:

SECTION 1. Part 13 (commencing with Section 14600) is added to Division 3 of Title 1 of the Corporations Code, to read:

PART 13. BENEFIT CORPORATIONS

CHAPTER 1. PRELIMINARY PROVISIONS

14600. (a) This part shall be applicable to all benefit corporations.

(b) The existence of a provision of this part shall not of itself create any implication that a contrary or different rule of law is or would be applicable to a business corporation that is not a benefit corporation. This part shall not affect any statute or rule of law that is or would be applicable to a corporation that is not a benefit corporation.

(c) The provisions of the General Corporation Law (Division 1 (commencing with Section 100)) shall apply to benefit corporations, except where those provisions are in conflict with or inconsistent with the provisions of this part.

14601. As used in this part:

(a) “Benefit corporation” means a corporation organized under the General Corporation Law that has elected to become subject to this part and whose status as a benefit corporation has not been terminated as provided in this part.

(b) “Benefit enforcement proceeding” means a claim or action relating to any of the following:

(1) Failure to pursue the general public benefit purpose of the benefit corporation or any specific public benefit purpose set forth in its articles.

(2) Violation of a duty or standard of conduct imposed on a director pursuant to this part.

(3) Failure of the benefit corporation to deliver or post an annual benefit report as required by Section 14630.

(c) “General public benefit” means a material positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation.

(d) “Minimum status vote” means that:

(1) In the case of a corporation, in addition to any other approval or vote required by Division 1 (commencing with Section 100) or the articles of incorporation, both of the following shall apply:

(A) The shareholders of every class or series shall be entitled to vote on the corporate action regardless of any limitation stated in the articles or bylaws on the voting rights of any class or series.

(B) The corporate action shall be approved by the outstanding shares of each class or series by at least two-thirds of the votes, or greater vote if required in the articles of incorporation, that all shareholders of the class or series are entitled to cast on that action.

(2) In the case of a domestic other business entity (Section 167.7), both of the following shall apply in addition to any other approval, vote, or consent required by the statutory law, if any, that principally governs the internal affairs of the entity or any provision of the publicly filed record or document required to form the entity, if any, or of any agreement binding some or all of the holders of equity interests in the entity:

(A) The holders of every class or series of interest in the entity that are entitled to receive a distribution of any kind from the entity regardless of any otherwise applicable limitation on the voting rights of the interest.

(B) The action shall be approved by the vote or consent of the holders described in subparagraph (A) by at least two-thirds of the votes or consents, or greater vote or consent if required in the articles of incorporation, of those holders.

(e) “Specific public benefit” includes all of the following:

(1) Providing low-income or underserved individuals or communities with beneficial products or services.

(2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business.

(3) Preserving the environment.

(4) Improving human health.

(5) Promoting the arts, sciences, or advancement of knowledge.

(6) Increasing the flow of capital to entities with a public benefit purpose.

(7) The accomplishment of any other particular benefit for society or the environment.

(f) “Subsidiary” of a person means an entity in which the person owns beneficially or of record 50 percent or more of the outstanding equity interests. For purposes of this definition, a percentage of ownership in an entity shall be calculated as if all

outstanding rights to acquire equity interests in the entity had been exercised.

(g) “Third-party standard” means a standard for defining, reporting, and assessing overall corporate social and environmental performance to which all of the following apply:

(1) The standard is a comprehensive assessment of the impact of the business and the business’s operations upon the considerations listed in paragraphs (2) to (5), inclusive, of subdivision (b) of Section 14620.

(2) The standard is developed by an entity that has no material financial relationship with the benefit corporation or any of its subsidiaries and that satisfies both of the following requirements:

(A) Not more than one-third of the members of the governing body of the entity are representatives of any of the following:

(i) Associations of businesses operating in a specific industry, the performance of whose members is measured by the standard.

(ii) Businesses from a specific industry or an association of businesses in that industry.

(iii) Businesses whose performance is assessed against the standard.

(B) The entity is not materially financed by an association or business described in subparagraph (A).

(3) The standard is developed by an entity that does both of the following:

(A) Accesses necessary and appropriate expertise to assess overall corporate social and environmental performance.

(B) Uses a balanced multistakeholder approach, including a public comment period of at least 30 days to develop the standard.

(4) All of the following information regarding the standard is publicly available:

(A) The criteria considered when measuring the overall social and environmental performance of a business.

(B) The relative weightings assigned to the criteria described in subparagraph (A).

(C) The identity of the directors, officers, any material owners, and the governing body of the entity that developed, and controls revisions to, the standard.

(D) The process by which revisions to the standard and changes to the membership of the governing body described in subparagraph (C) are made.

(E) An accounting of the sources of financial support for the entity, with sufficient detail to disclose any relationships that could reasonably be considered to present a potential conflict of interest.

14602. A benefit corporation shall be formed in accordance with Chapter 2 (commencing with Section 200) of Division 1 except that the articles shall also state that the corporation is a benefit corporation and shall identify any specific public benefit adopted pursuant to Section 14610.

14603. (a) A corporation may become a benefit corporation under this part by amending the corporation's articles so that the articles contain a statement that the corporation is a benefit corporation. The amendment shall not be effective unless it is adopted by at least the minimum status vote. If the amendment is adopted, a shareholder of the corporation may, by complying with Chapter 13 (commencing with Section 1300) of Division 1, require the corporation to purchase at their fair market value the shares owned by the shareholder which are dissenting shares as defined in subdivision (b) of Section 1300 in accordance with the procedures in that chapter, as if the adoption of the amendment were a reorganization to which that chapter applies.

(b) If a corporation that is not a benefit corporation is a constituent corporation in a merger reorganization or is the acquired corporation in an exchange reorganization, and the surviving corporation in the merger reorganization is to be a benefit corporation or the articles of the acquired corporation are to be amended in the exchange reorganization to provide that it will be a benefit corporation, then the reorganization shall not be effective unless the reorganization is approved by the corporation or domestic other business entity by at least the minimum status vote.

(c) If a domestic other business entity is a party to a merger reorganization and the surviving corporation in the reorganization is to be a benefit corporation, then the reorganization shall not be effective unless the reorganization is approved by the domestic other business entity by at least the minimum status vote.

(d) If a domestic other business entity is the converting entity (subdivision (d) of Section 1150) in a conversion in which the converted corporation (subdivision (a) of Section 1150) is a benefit corporation, the conversion shall not be effective unless the conversion is approved by the domestic other business entity by at least the minimum status vote.

14604. (a) A benefit corporation may terminate its status as a benefit corporation and cease to be subject to this part by amending the corporation's articles to delete the provision required by Section 14602. The amendment shall not be effective unless the amendment is adopted by at least the minimum status vote. If the amendment is adopted, a shareholder of the corporation may, by complying with Chapter 13 (commencing with Section 1300) of Division 1, require the corporation to purchase at their fair market value the shares owned by the shareholder which are dissenting shares as defined in subdivision (b) of Section 1300 in accordance with the procedures in that chapter.

(b) If a reorganization (Section 181) would have the effect of terminating the status of a corporation as a benefit corporation, the reorganization shall not be effective unless the reorganization is approved by at least the minimum status vote.

(c) If a benefit corporation is the converting corporation (Section 1150) in a conversion (Section 161.9), the conversion shall not be effective unless the conversion is approved by at least the minimum status vote.

(d) A sale, lease, conveyance, exchange, transfer, or other disposition of all or substantially all of the assets of a benefit corporation, unless the transaction is in the usual and ordinary course of business of the benefit corporation, shall not be effective unless the transaction is approved by at least the minimum status vote. If the transaction is approved, a shareholder of the corporation may, by complying with Chapter 13 (commencing with Section 1300) of Division 1, require the corporation to purchase at their fair market value the shares owned by the shareholder which are dissenting shares as defined in subdivision (b) of Section 1300 in accordance with the procedures in that chapter, as if the transaction were a reorganization to which that chapter applies.

CHAPTER 2. CORPORATE PURPOSES

14610. (a) A benefit corporation shall have the purpose of creating general public benefit. This purpose is in addition to, and may be a limitation on, the corporation's purpose under Section 206 and any specific purpose set forth in its articles in accordance with subdivision (b).

(b) In addition to the provisions required by Section 202, the articles of incorporation of a benefit corporation shall contain the following statement: “This corporation is a benefit corporation.” Notwithstanding subdivision (b) of Section 202, the articles of a benefit corporation may identify one or more specific public benefits that shall be the purpose or purposes of the benefit corporation. The identification of a specific public benefit under this subdivision does not limit the obligation of a benefit corporation to create general public benefit.

(c) The creation of general and specific public benefit as provided in subdivisions (a) and (b) shall be deemed to be in the best interests of the benefit corporation.

(d) A benefit corporation may amend its articles to add, amend, or delete the identification of a specific public benefit that shall be the purpose of the benefit corporation to create. The amendment shall not be effective unless the amendment is adopted by at least the minimum status vote.

CHAPTER 3. ACCOUNTABILITY

14620. (a) A director shall perform the duties of a director including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner the director believes to be in the best interests of the benefit corporation and with that care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(b) In discharging their respective duties, and in considering the best interests of the benefit corporation, the board of directors, committees of the board, and individual directors of a benefit corporation shall consider the impacts of any action or proposed action upon all of the following:

- (1) The shareholders of the benefit corporation.
- (2) The employees and workforce of the benefit corporation and its subsidiaries and suppliers.
- (3) The interests of customers of the benefit corporation as beneficiaries of the general or specific public benefit purposes of the benefit corporation.

(4) Community and societal considerations, including those of any community in which offices or facilities of the benefit corporation or its subsidiaries or suppliers are located.

(5) The local and global environment.

(6) The short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by retaining control of the benefit corporation rather than selling or transferring control to another entity.

(7) The ability of the benefit corporation to accomplish its general, and any specific, public benefit purpose.

(c) In discharging their respective duties, the persons described in subdivision (b) may consider any of the following:

(1) The resources, intent, and conduct, including past, stated, and potential conduct, of any person seeking to acquire control of the corporation.

(2) Any other pertinent factors or the interests of any other person or group.

(d) In discharging their respective duties, the persons described in subdivision (a) shall not be required to give priority to any particular factor or the interests of any particular person or group referred to in subdivision (b) or (c) over any other factor or the interests of any other person or group unless the benefit corporation has stated its intention to give priority to a specific public benefit purpose identified in the articles.

(e) In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, in each case prepared or presented by any of the following:

(1) One or more officers or employees of the benefit corporation whom the director believes to be reliable and competent in the matters presented.

(2) Counsel, independent accountants, or other persons as to matters that the director believes to be within those persons' professional or expert competence.

(3) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence, so long as, in any of those cases, the director acts in good faith, after reasonable

inquiry when the need therefor is indicated by the circumstances and without knowledge that would cause that reliance to be unwarranted.

(f) A director shall not be liable for monetary damages under this part for any failure of the benefit corporation to create a general or specific public benefit.

(g) A person who performs the duties of a director in accordance with this part shall not be liable for monetary damages for any alleged failure to discharge the person's obligations as a director.

(h) In addition to the limitations provided in subdivisions (f) and (g), the liability of a director for monetary damages may be eliminated or limited in a benefit corporation's articles to the extent provided in paragraph (10) of subdivision (a) of Section 204.

(i) A director shall not have a fiduciary duty to a person that is a beneficiary of the general or specific public benefit purposes of a benefit corporation arising from the status of the person as a beneficiary.

(j) A director of a foreign corporation that is subject to Section 2115 shall not be subject to Section 309 and shall be subject instead to this section if the director of the foreign corporation is subject to duties under its articles of incorporation, bylaws, or the law of its jurisdiction of incorporation similar to the duties of directors under this section.

14621. (a) The board of directors of a benefit corporation shall prepare for inclusion in the annual benefit report to shareholders required by Section 14630, a statement indicating whether, in the opinion of the board of directors, the benefit corporation failed to pursue its general, and any specific, public benefit purpose in all material respects during the period covered by the report.

(b) If, in the opinion of the board of directors, the benefit corporation failed to pursue its general, and any specific, public benefit purpose, the statement required by subdivision (a) shall include a description of the ways in which the benefit corporation failed to pursue its general, and any specific, public benefit purpose.

14622. (a) Each officer of a benefit corporation shall consider the interests and factors described in Section 14620 in the manner provided in that section when either of the following applies:

- (1) The officer has discretion to act with respect to a matter.

(2) It reasonably appears to the officer that the matter may have a material effect on any of the following:

(A) The creation of a general or specific public benefit by the benefit corporation.

(B) Any of the interests or factors referred to in subdivision (b) of Section 14620.

(b) The consideration by an officer of interests and factors in the manner described in subdivision (a) shall not constitute a violation of the duties of the officer.

(c) An officer shall not be liable for monetary damages under this part for any of the following:

(1) Any action taken as an officer if the officer performed the duties of the position in compliance with this section.

(2) Any failure of the benefit corporation to create a general or specific public benefit.

(d) An officer shall not have a fiduciary duty to a person that is a beneficiary of the general or specific public benefit purposes of a benefit corporation arising from the status of the person as a beneficiary.

14623. (a) No person may bring an action or assert a claim against a benefit corporation or its directors or officers under this chapter except in a benefit enforcement proceeding.

(b) A benefit enforcement proceeding may be commenced or maintained only as follows:

(1) Directly by the benefit corporation.

(2) Derivatively by any of the following:

(A) A shareholder.

(B) A director.

(C) A person or group of persons that owns beneficially or of record 5 percent or more of the equity interests in an entity of which the benefit corporation is a subsidiary.

(D) Other persons as have been specified in the articles or bylaws of the benefit corporation.

(c) A benefit corporation shall not be liable for monetary damages under this part for any failure of the benefit corporation to create a general or specific public benefit.

(d) If the court in a benefit enforcement proceeding finds that a failure to comply with this part was without justification, the court may award an amount sufficient to reimburse the plaintiff for the reasonable expenses incurred by the plaintiff, including

attorney's fees and expenses, in connection with the benefit enforcement proceeding.

CHAPTER 4. TRANSPARENCY

14630. (a) A benefit corporation shall deliver to each shareholder an annual benefit report including all of the following:

(1) A narrative description of all of the following:

(A) The process and rationale for selecting the third-party standard used to prepare the benefit report.

(B) The ways in which the benefit corporation pursued a general public benefit during the applicable year and the extent to which that general public benefit was created.

(C) The ways in which the benefit corporation pursued any specific public benefit that the articles state it is the purpose of the benefit corporation to create and the extent to which that specific public benefit was created.

(D) Any circumstances that have hindered the creation by the benefit corporation of a general or specific public benefit.

(2) An assessment of the overall social and environmental performance of the benefit corporation, prepared in accordance with a third-party standard applied consistently with any application of that standard in prior benefit reports or accompanied by an explanation of the reasons for any inconsistent application. The assessment does not need to be audited or certified by a third party.

(3) The name of each person that owns 5 percent or more of the outstanding shares of the benefit corporation, either beneficially, to the extent known to the benefit corporation without independent investigation, or of record.

(4) The statement required by Section 14621.

(5) A statement of any connection between the entity that established the third-party standard, or its directors, officers, or material owners, and the benefit corporation, or its directors, officers, and material owners, including any financial or governance relationship that might materially affect the credibility of the objective assessment of the third-party standard.

(b) The benefit report shall be sent annually to each shareholder within 120 days following the end of the fiscal year of the benefit corporation or at the same time that the benefit corporation delivers any other annual report to its shareholders.

(c) A benefit corporation shall post all of its benefit reports on the public portion of its Internet Web site, if any, except that the compensation paid to directors and any financial or proprietary information included in the benefit report may be omitted from the benefit report as posted on the Internet Web site.

(d) (1) If a benefit corporation does not have an Internet Web site, the benefit corporation shall provide a copy of its most recent benefit report, without charge, to any person that requests a copy.

(2) The benefit corporation may omit any proprietary or financial information, including, but not limited to, compensation paid to directors, from the copy of a benefit report that the benefit corporation provides pursuant to paragraph (1).

14631. All certificates representing shares of a benefit corporation shall contain, in addition to any other statements required by the General Corporation Law (Division 1 (commencing with Section 100)), the following conspicuous language on the face of the certificate:

“This entity is a benefit corporation organized under Part 13 (commencing with Section 14600) of Division 3 of Title 1 of the California Corporations Code.”

Approved _____, 2011

Governor